SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1084

W. COFFEE, INDIVIDUALLY AND AS TRUSTEE FOR RUTH COFFEE COBLE, EDGAR COBLE, ORIN COFFEE, WOODSON COFFEE, JR., RAY C. COFFEE, OLLIE COFFEE WILLIS AND HUSBAND, WADE WILLIS, J. K. COFFEE, AND VELDA BANGS COFFEE,

Petitioners and Appellees Below,

vs.

THE SHAMROCK OIL AND GAS CORPORATION,

Respondent and Appellant Below.

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO FIFTH CIRCUIT COURT OF APPEALS.

I.

Opinion of Courts Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in 140 Fed. (2) 409-413.

II.

Jurisdiction.

1.

The date of the Judgment of the Circuit Court of Appeals is February 3, 1944 (R. 674). A Petition for Rehearing was seasonably filed and was denied on March 17, 1944 (R. 683).

2.

One statutory provision which is believed to sustain the jurisdiction of this Court is that part of Rule 52-A of the Rules of Civil Procedure, promulgated by the Supreme Court of the United States under authority of Title 28, Sections 723 (b) and 723 (c), U. S. C. A., reading as follows: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witnesses".

3.

Another statutory provision which is believed to sustain the jurisdiction of this Court is Title 15, Section 1, U. S. C. A., which provides in part as follows: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal * * *".

4.

Another statutory provision which is believed to sustain the jurisdiction of this Court is Title 15, Section 15, U. S. C. A., which provides in part as follows: "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor

in any district court of the United States * * * without respect to the amount in controversy * * *".

5.

The Trial Court made a finding of fact (Tr. p. 54) as follows:

> "6. That the market relied upon by defendant to sustain market value from July 1, 1937 to date of trial was not a free, open and competitive market but was a suppressed market, and such distress price reflected by the schedules adopted by the Natural Gasoline Association of America and the payment for the gasoline portion on the field or charcoal test rather than of actual recovery was not the regular or fair market value at the wells where produced. That the fair market value of said gas at the wells where produced in Moore County, Texas including the wells involved herein was 1¢ per m. c. f. during the period of time from July 1, 1947 to December 31, 1941, and was 1.4¢ per m. c. f. from January 1, 1942 to December 31, 1942."

This finding was based on evidence that the buyers or processors of natural gas had combined themselves in The Natural Gasoline Association of America and had promulgated a formula, known as the NGAA Contract, to regulate, control and restrict (Tr. p. 453) the market for such gas. (For complete history see Tr. pp. 447 to 455; and also Tr. pp. 233 to 259.) Further evidence showed the market, outside of the NGAA Contract, was from 1¢ to 2¢ per m. c. f., or about twice the prices paid under the NGAA schemes; thus forming the basis of the Court's finding in the last sentence as quoted above (See Tr. pp. 163, 167, 76, 212-213, 237-239).

The Circuit Court overruled this finding of fact, (140 Fed. (2) exact page 411) and held that the fixed and restricted market promulgated by NGAA was the criterion for fair

market value in this case (140 Fed. (2) exact page 412). It is believed that this holding by the Circuit Court contravenes the anti-trust laws by declaring a restricted market to be legal when Title 15, Section 1, U. S. C. A. declares such a market to be illegal.

6.

The cases believed to sustain the jurisdiction of this Court are as follows:

Chattanooga Foundry v. *Atlanta*, 27 S. Ct. 65;
U. S. v. *Trans-Missouri Freight Ass'n*, 17 S. Ct. 540;
U. S. v. *Joint Traffic Ass'n*, 19 S. Ct. 25;
Montague v. *Lowry*, 24 S. Ct. 307;
Gibbs v. *McNeeley*, 118 Fed. 120;
Heiner, Collector of Internal Rev. v. *Crosby*, 24 Fed. (2) 191;
M. & R. River Boom Co. v. *Patterson*, 98 U. S. 403;
Chinn v. *Gollen*, 109 Fed. (2) 66;
Luzier's v. *Nee*, 106 Fed. (2) 130.

Statement of the Case.

Much of the confusion as to market value of natural gas existing in the various opinions of the Circuit Court for the Fifth Circuit, as pointed out in the foregoing Petition, is apparently due to the failure of counsel to impress the factual history of this class of litigation on the mind of the Court. It is a rather specialized branch of the law and not one universally understood by bench and bar. However, once the picture is in mind it becomes rather simple, (Full description: Tr. pp. 233 to 259) although it has been advantageous to counsel for the major processors of this commodity to give those facts a background of complexity and confusion.

For the sake of brevity, we refer to the statement, (P. 1, this cover) made at the beginning of our Petition. For the

sake of clarity, however, we wish here to review more specifically other salient historical points in this litigation.

To begin with, we had, in the early days of the industry, a raw commodity, natural gas, which, after being produced from the mouth of the well, was processed into two, *and only two*, component marketable products. Those two component products were *raw gasoline* and *residue gas*. In those days the processors of this natural gas adopted the NGAA schedule (Tr. pp. 406-415, 416-428, 514-524) to determine *market value* at the well. It is called the *NGAA Contract* but in reality *it is not a contract*, because it was merely an agreement between the major processors *without* the consent of your Petitioners who were the sellers of the gas (Tr. p. 484 and p. 514).

The NGAA schedule fixed the market price at the well on the basis of current market prices for *raw gasoline* and *residue gas* (Tr. pp. 416, 514-524). As pointed out by the Circuit Court in this case (140 Fed. (2) 413) this method apparently was approved by the Circuit Court in *Armstrong* v. *Skelly*, 55 Fed. (2) 1066, 1067. While we think the decision in the *Armstrong* case was based on a failure to clearly understand the facts of that case, that is not the point in the case at bar.

The point here is that, *later in the development of the industry*, the major processors began manufacturing other lighter liquids, butanes and propanes, *from the residue gas*, but failed to take the sales prices of those newly developed liquids into consideration in computing the market price of the raw natural gas at the mouth of the well (Tr. p. 247). Not until shortly before this suit was filed in Trial Court did the Respondent in this case begin any sort of an effort to afford its royalty owners the benefits due them for this *increased value* of their gas.

The Trial Court after hearing this testimony, and having the facts clearly in mind, found that this schedule agreed

upon by the major processors, who constituted the sole membership (Tr. pp. 447 to 455) of the Natural Gasoline Association of America (notwithstanding a contrary statement by the Circuit Court, 140 Fed. (2) 412), arbitrarily fixing market price and refusing to consider the *new value* factor afforded by development of butanes and propanes, was a "suppressed market" and a market that was not "Free, open and competitive" (Tr. p. 54).

The Circuit Court says (140 Fed. (2) 411) that it does not understand what the Trial Court meant by "suppressed market." *That is clearly true; and is true because the Circuit Court never did get the proper conception of either the facts or the theory of your Petitioners in bringing this action.*

Our theory was and is that if the accepted method of computing "market value at the well" was correct, as adopted by the Respondent, by considering the current sales prices, less cost of processing, of the products derived from the raw gas, then the arbitrary *refusal to take into account all of such products*, including butanes and propanes, constitutes a suppression of the market. Further, the tacit understanding and factual adoption of this arbitrary method of market value computation by all the members of NGAA constituted a monopolistic and illegal market in restraint of trade. This sort of a market was rightly ignored by the Trial Court and his finding as to "true market value" was based on other sales of the raw natural gas to the minority market *not affiliated with NGAA* (Tr. p. 54).

Specification of Errors.

I.

The Circuit Court of Appeals erred (140 Fed. (2) 412) in holding that "The NGAA Contract was between the buyer and the seller and not between the buyers", when the seller,

your Petitioners, had never executed nor agreed in any manner to that contract, as admitted by counsel for Respondent (Tr. p. 484).

II.

The Circuit Court of Appeals erred in holding that "the Court below did not find that the NGAA form of contract was a monopolistic arrangement which unlawfully depressed the price and that the Defendant was a party to such an arrangement", (140 Fed. (2) 412), because the Court below did find that the NGAA form of contract used by the Defendant as market value basis resulted in a "suppressed market" and a market "not free, open and competitive", which finding by the Trial Court clearly defines a monopolistic market (Tr. p. 54).

III.

The Circuit Court of Appeals erred in overruling a finding of fact (Tr. p. 54) by the Trial Court, which finding of fact was abundantly supported by the testimony (140 Fed. (2) 411).

IV.

The Circuit Court of Appeals erred in holding that a market based on the arbitrary refusal of all major buyers and processors of raw natural gas to take into account the *new value* of *newly developed* products of the process, (butanes and propanes), where those processors and buyers had maintained that market value of the raw natural gas should be determined by computing the net value of its components, was not a suppressed market and was a free, open and competitive market (140 Fed. (2) 412).

V.

The Circuit Court of Appeals erred in holding that no monopoly existed where all the members of an association

of buyers of a commodity adopted a uniform buying schedule which arbitrarily eliminated a component factor affecting the market value in the limited market offered to these petitioners who were not included within the membership or scope of such association (140 Fed. (2) 412-413).

VI.

The Circuit Court of Appeals erred in holding that a market which was arbitrarily fixed, controlled and suppressed by an association of buyers must be treated as creating "Fair market value" (140 Fed. (2) 413).

ARGUMENT.

Summary of the Argument.

POINT A.

Trial Court's findings of fact must be taken as established, on appeal, when supported by evidence.

POINT B.

Prices paid for a commodity in a restricted or suppressed market do not represent the true value or fair market value of that commodity.

POINT C.

Where, as in this case, it is shown that all of the major buyers of a commodity have perfected a scheme whereby prices and schedules of prices and methods of arriving at prices paid are controlled and regulated largely by such major buyers of such a commodity, such a price so arrived at does not represent fair or true market value.

POINT D.

In a suit for an accounting under a gas lease for the fair market value of the gas, where it is shown that the buyer of such gas paid only the amount specified in a restricted or suppressed market, the Court may consider all other contracts and price affecting factors in the record in determining either the actual value or the fair market value of the gas during the period or periods involved.

Analysis of Issues.

For the sake of brevity and clarity in style of briefing, we shall brief all of our points under this one argument. As we see it, the case turns fundamentally upon the issue as to whether there is evidence in the record to support the Trial Court's Sixth Finding of Fact (Tr. Page 54). Corollary to that issue is the further need to indicate the law as to the power of the Trial Court to render the judgment entered herein on the basis of that finding of fact.

Because of its importance to this case we repeat, with our own emphasis, the Sixth Finding of Fact (Tr. p. 54), as follows:

> "6. That the *market relied upon by defendant to sustain market value* from July 1, 1937 to date of trial *was not a free, open and competitive market but was a suppressed market*, and such distress price reflected by the use of the schedules adopted by the Natural Gasoline Association of America and the payment for the gasoline portion on the field or charcoal test rather than of actual recovery *was not the regular or fair market value* at the wells where produced. That the fair market value of said gas at the wells where produced in Moore County, Texas including the wells involved herein was 1¢ per M. C. F. during the period of time from July 1, 1937 to December 31, 1941, and was 1.4¢ per M. C. F. from January 1, 1942 to December 31, 1942."

In other words the Trial Court found there were *two markets* in this field. One market was the NGAA market, relied on by defendant, as predetermined by the so-called NGAA Contract, dictated by the Natural Gasoline Association of America. The other was the market in which independent processors and small refineries competed with each other for the gas. The Court, *after hearing the evidence,* found the former not to be the true market and that the latter truly represented fair market value.

Analysis of the Evidence.

All of the major purchasers of raw gas affiliated with NGAA in the Panhandle Field for the period involved paid an average price of $.005 to $.008 per thousand cubic feet at the well. Such purchases were made in accordance with a *pre-arangement* between such major purchasers under what is described in the Record as the NGAA Contract (Tr. pp. 406-415, 416-417, 514-524). It was this *prearranged buying schedule* to which the Trial Court referred in the Sixth Finding of Fact (Tr. p. 54) as a "suppressed market" and a market that was not "free, open and competitive".

That it was not a free, open and competitive market is clearly shown by the Record. In the case at bar, the Petitioners, plaintiffs below, had never executed the NGAA Contract and *were not bound by it in any way* (Tr. p. 484). The only contracts in existence were the original Oil and Gas Mining Leases (Tr. pp. 59-65). Yet, Petitioners had been forced to accept the NGAA schedule (Tr. pp. 484, 514) as the basis for market value of their gas.

That the NGAA arrangement between the major purchasers of this gas was a restricted or suppressed marketing scheme is clear from the testimony of defense witness, J. W. Black, an employee of one of the NGAA members, the Magnolia Petroleum Company, in charge of gas pur-

chases and sales (Tr. p. 107). After a great deal of descriptive testimony, describing the workings of the NGAA Contract and schedule, Mr. Black makes a rather startling admission (Tr. p. 163) that other independent contracts then being exhibited to him were much more favorable to the royalty owner. The specific testimony of Mr. Black is as follows:

> "Q. These special contracts, Mr. Black, you have just read, are where the royalty owner gets a straight twenty-five per cent of the actual recovery and he has a guaranty of a cent and a half for residue gas, in fixing the market value, wouldn't you want to average up those special contracts along with your NGAA contract to get at the market value, wouldn't you take those into consideration in arriving at the market value?
>
> "A. My own personal opinion would be to discard that and take the predominating prices of the sales in the field.
>
> * * * * * * *
>
> "Q. Well, now, this Huber Contract, the two Huber contracts you have just read, Exhibits 4 and 5, one Huber with the Burnet Estate and one Huber with Weatherly, wouldn't you say that under contracts like that, with those prices set out there fairly, that the market value, that it would make the market value of the gas at the mouth of the well be greater than it would be under the NGAA Contract?
>
> "A. Yes, sir."

Of course the exhibits referred to were "arms length contracts" made without regard to the NGAA arrangement (Tr. pp. 100-634-641). Under the authorities which we shall discuss later, it will be clearly seen that such "arms length" contracts have true probative weight as to "fair market value", while suppressed or restricted market quotations, such as the NGAA schedule do not.

Perhaps the most interesting of all the testimony is that given by Mr. J. H. Dunn, Vice President and General Manager of the Respondent Company (Tr. p. 167). After a rather lengthy and scholarly discourse on both material and immaterial matters we find this interesting testimony by Mr. Dunn (Tr. pp. 184-185):

> "The Shell Sinclair paid us a flat price of three-fourths of a cent per thousand cubic feet for gas processed, plus one hundred per cent of all of the butanes and propanes or liquid petroleum products that we can extract from the gas.
>
> "Q. Three-fourths of a cent per thousand cubic feet and one hundred per cent of the butane?
>
> "A. Butanes and propanes as might be extracted.
>
> "The Court:
>
> You got the butanes and propanes and three-fourths of a cent?
>
> A. Yes, sir.
>
> Q. What about 26-70 gasoline?
>
> A. They got the 26-70 gasoline, that was theirs, we processed the gas for them for that purpose.
>
> Q. They got all of that?
>
> A. Yes.
>
> Q. And you charged them three-fourths of a cent per thousand cubic feet for processing, plus the butane?
>
> A. Yes, you understand they got—there is one other qualification about that 26-70, they got the 26-70 as would come to them on an average content of one-third of a gallon per thousand cubic feet. Anything over one-third of a gallon per thousand cubic feet of 26-70 we got, in addition to the three-fourths of a cent and in addition to the one hundred percent of the butane.
>
> Q. And they got all of the residue?
>
> A. They got all of the residue. They have never sold us any gas under that contract."

This means that the Shell Sinclair got *all residue gas* and *all raw gasoline* under this contract. The Respondent

received ¾¢ per M.C.F. plus the butanes for this processing of the raw gas. Had the Respondent paid Petitioners on this basis the "market value" would have been close to 2¢ per M.C.F. instead of around ½¢ per M.C.F. We base this statement on the clear testimony in the Record that residue gas was selling for 1¢ per M.C.F. (Tr. pp. 550-551 and p. 374.) The average price for raw gasoline was about 3¢ or 4¢ per gallon (Tr. pp. 501-502). The gas produced about ⅓ to ½ gallon per M.C.F. (Tr. p. 508). This made a gross value per M.C.F. of about 2¾¢ to 3¢. You have a net value of 1¾¢ to 2¼¢ per M.C.F. that was actually received by Shell-Sinclair for its raw gas after giving Respondent all the butanes, etc. and ¾¢ per M.C.F. in cash for processing. This was an "arms length" contract between two equally situated contracting parties and under the authorities cited below constitutes the strongest possible evidence as to the true value or fair market value of the commodity involved. And while these *equally situated parties* both members of NGAA were so dealing with each other, the Petitioners were being paid only about $.005 to $.008 per M.C.F. for their gas.

It was on the basis of such testimony throughout the Record that the Court made his findings of fact indicated above. That such finding of fact is amply supported by such evidence can scarcely be seriously disputed.

The Circuit Court of Appeals erroneously stated in syllabus five of its opinion that the processing contract of the Shell-Sinclair leases and the Huber contracts were not comparable and have little or no probative value (Tr. —). The evidence of Mr. Dunn quoted above showed that this gas from the Shell-Sinclair leases was of the same character as the Coffee gas in the same vicinity and went to the same plant. As pointed out above, Shell-Sinclair got a net value out of said gas from 1¾ to 2¼ cent per M.C.F. This was because that the Shell had the *power of election as to the*

time and terms, the test as laid down in the *Logan* case cited herein. In other words Shell-Sinclair paid ¾ cents in cash plus all the butane to have this gas processed, while their witness Mr. Cowles and all the other representatives of the NGAA bunch claim that the price of gas was less than 7/10 of a cent. This does not make sense.

The trial court took into consideration such inconsistent opinions and statements of these witnesses representing the various members of the Natural Gasoline Association of America and had a right to weigh that testimony with suspicion as this Honorable Court so well stated in *Sartor* v. *Aarkansas Natural Gas Corporation,* 88 L. Ed. 597, in a recent opinion.

There was much testimony as to the "fair market value" of this gas to support the Trial Court's findings. We shall quote some of the most pertinent.

Testimony of M. E. Roberts (Tr. p. 76):

> "That is my question, the value of raw gas at the mouth of the well.
>
> A. Well, about the best answer I can give, I will say for the last five years my answer would be at the mouth of the well, depending of course, upon the conditions, it would be between one and one-half and two cents per thousand and previous to five years back, say beginning in 1933, I would say from one to one and one-half cents a thousand.
>
> Q. You mean by that that there has been some increase in the market value the last five years?
>
> A. I think so.
>
> Q. And what do you attribute to that, Mr. Roberts?
>
> A. Well, certainly you could attribute it to the great improvement in the plant facilities and improvements in their equipment of that plant.

Testimony of W. E. Sanders (Tr. pp. 212-213):

> Q. You are familiar with the provision in the NGAA contract that the gasoline percentage will be paid on

the charcoal test, provision is made for the gasoline content as agreed upon, the charcoal test, you are familiar with that?

A. That is right.

Q. Are you familiar with the practice of the users of the NGAA Contract to settle with royalty owners in making remittances, strictly on charcoal tests and on one-half of the residue, and then to retain all of the other recovery except in certain butane payments that are made, are you familiar with the practice of the companies using that contract.

A. Yes, sir.

Q. Now, Mr. Sanders, bearing in mind your experience in the gas accounting business, the audits and investigations that you have made, your familiarity with these various special contracts that we have asked you about, the inquiries you have made and the information you have received in your investigations concerning the market value of gas, do you have an opinion as to the value of dry sour gas in the west field, in the Panhandle area over the period of time from July 1, 1937 down to date, do you have an opinion as to that value?

A. Yes, I do.

Q. Does sour gas, during this time, does it have a market value?

A. Yes, sir, it has a market value.

Q. What, in your opinion, is that value per thousand cubic feet at the mouth of the well, raw sour dry gas?

Q. What is that?

A. I would say it would range from one and one-half cents to two cents.

Testimony of C. J. Fowlston (Tr. pp. 237-239):

Q. Were you in the Courtroom at the time when testimony was being given by the witness with reference to this Weatherly-Huber contract, Exhibit No. 4, did you hear the testimony about such a contract?

A. I did.

Q. Did you hear the testimony with reference to Exhibit 5, the Burnett-Huber contract?

A. I did.

Q. Are you familiar with the NGAA contract through which considerable sour gas and casinghead gas is sold in this area.

A. I am.

Q. Have you in your business as royalty owner, and as a gas engineer, kept up with the development in the market and the prices and progress made in the gas and gasoline industry, Mr. Fowlston?

A. Yes, sir.

Q. Do you know of your own knowledge of contracts other than the NGAA contracts, and other than these Huber contracts I have mentioned, special contracts pertaining to the sale of gas in this area, do you know of any special contracts?

A. Yes, I know of some.

Q. Mr. Fowlston, what, if you know, is the average price charged for gas for drilling operations in this field, in the west field?

A. Three to five cents per thousand cubic feet.

Q. Have you made a study and investigation of the plant efficiency in this area, I mean the recovery of liquefied gas and extraction?

A. Yes, sir.

Q. Of the gasoline?

A. Yes, sir.

Q. I will ask you whether considerable progress has been made along that line in the improvement of equipment and efficiency?

A. Efficiency of the plant is increasing because of better knowledge and better equipment.

Q. With this development of the butane market and this improvement in plant efficiency, under testimony here awhile ago, that there is an average of certain plants of 232 percent, average of 232 percent above the charcoal test, state whether or not that adds materially to the value of the gas market?

Q. What about that?

A. In my opinion, it does.

Q. With your knowledge of all of these matters you have testified about, and taking into consideration these contracts mentioned, the NGAA Contract, as written, and the additional recoveries that are now being obtained, do you have an opinion as to the market value of raw sour dry gas at the mouth of the well in this area?

A. I do.

Q. What is that, how much is that?

A. I think the value at the present time is in excess of two cents per thousand cubic feet.

Q. You mean at the mouth of the well?

A. At the mouth of the well.

Q. Go back to July, 1937, what would be your answer as to the value at that time?

A. The value would have been less at that time.

Q. What would you say it would have been from July 1, 1937 down to date?

A. In the neighborhood of one and one-half cents."

We shall not burden the Court with more of such quotations, but the gist of the entire Record is that, under the NGAA scheme of price fixing, the price of raw gas at the mouth of the well, for the period involved, averaged from $.005 to $.008 per M. C. F. while other independent, arms-length contracts paid from 1¢ to 2¢ per M. C. F. Such a fact record certainly is sufficient to support the Sixth Finding of Fact (Tr. p. 54) by the Trial Court.

The Circuit Court became confused on one fact issue which we think should be clarified. That Court said, "The NGAA Contract was between the buyer and seller and not between the sellers" (140 Fed. (2) 412). The Circuit Court stated the facts *exactly in reverse* here—and this no doubt influenced the whole opinion.

The NGAA Contract *was agreed upon by the buyers* of gas and was written by them, purportedly to be executed by the buyer on one hand and the seller on the other (Tr. p.

416). It was to be presented to the royalty owners in the form of a supplemental contract, known in the industry as a "division order," and the royalty owner was to be requested to execute it. All the members of NGAA did this with their royalty owners simultaneously.

Where the royalty owner refused to execute such a "division order," the Respondent and other major processors simply made the royalty payments as if he had so executed it (Tr. 347 and 142). Of course, Petitioners never have executed such a "division order" (Tr. p. 484 and p. 514).

Since Respondent owned the lease on Petitioners' lands, Petitioners could do nothing but accept whatever payments were made, pending the result of this suit. However, the Circuit Court was in error in holding that the NGAA Contract, so called, was between the buyer and seller in this case, because the seller, your Petitioners, had never executed such a contract (Tr. p. 484 and 514).

By a tacit, or perhaps express, understanding between the processors of natural gas, they had uniformly forced the NGAA price fixing scheme upon all royalty owners in this field, whether such royalty owners could be coerced or persuaded to sign "division orders" or not.

It was this situation which the Trial Court found was not a free, open and competitive market. He further found the independent market to be higher and so awarded a judgment to Petitioners.

Analysis of the Law.

It is unnecessary to devote much time and space to our Point A, which simply is an announcement of that portion of Rule 52-A of Federal Rules of Civil Procedure providing that findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses.

This rule, which has always been followed in effect, throughout the United States, seems to be well recognized and followed in all jurisdictions. See:

Chinn v. *Llan Gollen*, 109 Fed. (2d) 66;
Gray v. *United States*, 109 Fed. (2d) 728;
Chain O'Mines v. *United Gilpin Corp.*, 109 Fed. (2d) 617 (CD);
Jameson v. *Brown*, 109 Fed. (2d) 830;
In Re Mifflin, 34 Fed. Supp. 164;
Woodburn v. *Standard*, 112 Fed (2d) 271;
Pressed Metals of America, Inc. v. *Woolworth*, 119 Fed. (2d) 210;
Luzier's v. *Nee*, 106 Fed. (2d) 130;
United States v. *Adler*, 107 Fed. (2d) 987;
Snap Oil & Realty Co. v. *Elbert*, 108 Fed. (2d) 661.

In the *Woodburn* case, supra, the rule is stressed that on appeal the evidence must be considered in the light most favorable to the prevailing party below; that is, in favor of sustaining the findings of the Trial Court. In *Luzier's* v. *Nee*, supra, there was presented the question of whether Luzier's had been the object of prejudice by the collector of internal revenue. The Trial Court made a special finding that Luzier's had "passed on" to his customers the taxing charge which the collector had made. In other words, in determining fact issues, the Trial Court has the power and it is his duty to determine market value from all the facts and circumstances.

This Record can leave no doubt that the NGAA contract-schedule was a scheme to restrict and control prices. The cases are numerous on definition of restricted or suppressed markets and the federal statute is clear on that point. A review of the decisions supports our contention that the market here relied upon by the Respondent was such a

restricted or suppressed market. The Trial Court so found (Tr. p. 54).

The general law on this subject is vastly different in complexion from the theory as advanced by the Respondents and decided by the Circuit Court. It has been held that any *agreement* or *combination* which directly operates upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or *restricting its purchase, sale* or exchange, or by destroying, *restricting* or *stifling* free competition therein, thereby regulates and restrains interstate commerce to that extent, and to the same extent trenches upon the powers of Congress and violates the anti-trust act. There is no doubt that combinations *formed for the purpose* of fixing and maintaining *arbitrary* and non-competitive prices or rates violate the anti-trust laws (*U. S.* v. *Trans Missouri Freight Ass'n*, 17 S. Ct. 540; *U. S.* v. *Joint Traffic Ass'n*, 19 S. Ct. 25; *Montague* v. *Lowry*, 24 S. Ct. 307; *Chattanooga Foundry* v. *Atlanta*, 27 S. Ct. 65; *Continental Wall Paper Co.* v. *Voight*, 29 S. Ct. 280; *U. S.* v. *Kissel*, 31 S. Ct. 124; *Dr. Miles Medical Co.* v. *Park*, 31 S. Ct. 376; *U S.* v. *American Tobacco Co.*, 31 S. Ct. 632; *Standard Oil Company* v. *U. S.*, 31 S. Ct. 502; *U. S.* v. *St. Louis Terminal*, 32 S. Ct. 90; *U. S.* v. *Patten*, 33 S. Ct. 141; *Lumber Dealers* v. *U. S.*, 34 S. Ct. 951; *Lawlor* v. *Lowe*, 35 S. Ct. 170; *Addyston Pipe* v. *U. S.*, 20 S. Ct. 96; and many other cases. See also 64 L. R. A. 700 et seq.; 10 L. R. A. (N. S.) 268 et seq.; 2 Am. Cas. 956 et seq.; Ann. Cases 1912 D 764 et seq.).

The anti-trust statute does not contemplate that the combination, to be illegal, must be one which shall by its terms refer to interstate commerce. The true test is not what the agreement professes to be, but *what it accomplishes*, and such agreements must be dealt with in view of the known facts which surround their formation and performance

(*Gibbs* v. *McNeeley*, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152).

It is not necessary to show that such agreements constitute a *complete monopoly*. It is only necessary to show that, by its necessary operation, such a contract or combination tends to restrain trade or create a monopoly and to deprive the public of the advantages of free and open competition (*U. S.* v. *Knight*, 15 S. Ct. 249; *Anderson* v. *U. S.*, 20 S. Ct. 96; *Northern Securities* v. *U. S.*, 24 S. Ct. 436; *Swift* v. *U. S.*, 25 S. Ct. 276; *Waters-Pierce Oil Co.* v. *State*, 29 S. Ct. 220. See also 10 L. R. A. (N. S.) 271; 2 Ann. Cases 957, 959).

A "Monopoly" results when a few persons, acting coordinately, have thereby obtained the power to control rates, schedules, and prices. Nor does this power have to be absolute or complete. It may be tempered by some fear of competition and may affect only some phases of rates and prices. It is none the less a violation of the Anti-trust Act. (*U. S.* v. *Addyston Pipe*, 20 S. Ct. 96).

Because one party to an illegal combination may be less restricted or more loosely bound thereby does not remove his culpability. His violation of the Act is not affected by reason of the fact that he may enjoy a certain freedom of competition in certain areas and instances to meet local or special conditions. (*Standard Sanitary Mfg. Co.* v. *U. S.*, 33 S. Ct. 9).

The Record shows that all of the major purchasers of raw natural gas in the area involved adhered as closely as possible to the NGAA schedule which had been devised to fix or at least limit the so-called market price of such gas. Respondent, after freely making this admission, attempts to use that schedule as a criterion for fair market value. The Trial Court held, correctly we think, that he was not bound to consider such a situation to be a fair market, but might enquire into all other contracts and factors having

a bearing upon the actual or *fair* market value. We shall cite some very interesting authorities on this point.

One of the most pertinent cases is that of *Heiner, Collector of Internal Revenue* v. *Crosby,* 24 F. (2) 191. In that case we find the following language by the Third Circuit:

> "The fair market price or value of stock at a particular time *is a question of fact,* to be determined from *all the circumstances.* Market price implies the existence of a market, of supply and demand, of sellers and buyers. Sales are always evidence of a market price, but the statute requires that, in ascertaining the gain derived from the sale, there must be not simply a *market price,* but a *fair market price.* Sales made at a particular time and place may be significant, but the *price paid* is not necessarily decisive of *fair market price or value.* The fact of sales, in itself and *without* regard to the circumstances under which the sales were made, does not conclusively establish either statutory fair market price *or value.* Sales made under peculiar and unusual circumstances, such as sales of small lots, forced sales and *sales in a restricted market,* may neither signify a *fair market price or value,* nor serve as the basis on which to determine the amount of gain derived from the sale. In such cases resort *must be had* to evidence to determine fair value. Offers made in good faith and *opinions of intelligent men experienced in the business* are admissible to show fair value."

In this connection, see holdings to the same effect in: *L. & N. R. R. Co.* v. *Western Union Telegraph Co.,* 249 F. 385; *North American Telegraph Co.* v. *Northern Pacific Ry. Co.,* 254 F. 417; *Walter* v. *Duffy,* 287 F. 41; *M. & R. River Boom Co.* v. *Patteroon,* 98 U. S. 403; and *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 33 S. Ct. 667.

There are many cases holding that "market value is determined by what a prudent owner would sell for at a sale *if he had the power of election as to the time and terms".*

In re Schuyler, et al., 63 F. (2) 241; *Logan* v. *Com'r*, 42 F. (2) 193; *Weed* v. *Lyons Co.*, 294 F. 725; *Hurley* v. *U. S.*, 10 Fed. Supp. 365.

The fairness of this rule is demonstrated in the case at bar. Wherever, in this Record, we find an *independent* contract for the sale of sour gas, we find a market price running from 1¢ to 2¢ per thousand cubic feet. Wherever we find, in this Record, a case where the seller or owner of the gas has "the power of election as to the time and terms" of such sales or sales contracts, the price of sour gas doubles, and sometimes quadruples, the "restricted market" price afforded royalty owners generally under the NGAA Contract-schedule. This principle of the law was recognized by the Trial Court when he made his finding in the Sixth Finding of Fact (Tr. p. 54).

As it was stated in *North American Telegraph Co.* v. *Northern Pacific Ry. Co.* (254 F. 417):

> "The elements which witnesses may properly bring forward in such a case are those which experienced and intelligent business men would present, if they were negotiating with respect to the property in question."

The evidence of M. E. Roberts (Tr. p. 76) was of this character. As manager of a large and powerful estate, Mr. Roberts had negotiated much more favorable contracts than afforded by the NGAA schedule for the sale of gas on the lands controlled by him. All of Mr. Roberts' testimony, and particularly this feature of it, was taken into consideration by the Trial Court. There were others of like character who gave testimony, quoted by us in part above, to corroborate Mr. Roberts' estimate from 1¢ to 2¢ per m. c. f. market valuation for this gas.

If we transpose the situation of this case to a more universal commodity, milk for example, the simplicity of the problem becomes apparent. If Richard Roe contracts

to buy and process raw milk from John Doe at the market value at the farm, everyone understands what is intended. Then if Richard Roe joins a milk processors association and they agree that the market price at the farm shall be determined by a certain percentage of the sales price of butter fat and skimmed milk after the processing, we all understand that. And if, after establishing the custom of so computing the market value of the raw milk, Richard Roe should begin to manufacture a third commodity, such as cheese, from the skimmed milk, the very custom or practice of computation that he himself, with his associates, had established would require him to consider the additional value resulting from the manufacture of cheese incomputing the raw milk market.

This is true for two reasons: (1) By taking a part of the skimmed milk to manufacture cheese, Richard Roe has reduced the volume and quality of skimmed milk in the sale of which John Doe should participate. (2) The very enforced custom of computation dictated by the milk processors association is based on the theory that the raw milk producer shall participate in the net sales of the products of his raw milk to obtain his *market value.*

We do not say that the milk processors would have a legal right to so combine to create a controlled market. Nor do we admit that the Natural Gasoline Association of America had a legal right to establish such a fixed formula to control the market for raw gas. But we do say that Respondent, having followed this formula, to the letter, has no right, while upholding the legal virtue of that formula, to deny us our portion of the "cheese," which is, in this instance, the *butanes* and *propanes* (Tr. pp. 233 to 259).

To carry the analogy further, suppose John Doe sues Richard Roe for an accounting and proves up the fore-

going facts. Then suppose witness after witness testifies that, on the independent market not controlled by the milk processors association, raw milk has been selling for from twice to three times as much as has been paid by the association members. What Court in the land would fail to recognize that there was a suppressed or restricted market being promulgated by Richard Roe and his association? What Court of justice would proclaim the milk processors market in such a case to be an open, free, and competitive market? And what Court of justice would deny the probative force of the witnesses' testimony as to the price of milk on the independent market?

Our case here is identical. The only difference is that our raw commodity is natural gas instead of raw milk and our processed products are gasoline, residue gas, and butanes, instead of butter, skimmed milk and cheese.

The witness Cowles gives an account of this NGAA market (Tr. pp. 447 to 455) which alone supports the Court's finding of fact; and Mr. Cowles was, by his own testimony (Tr. pp. 393 to 394), one of the moving spirits in promulgating the NGAA market. Mr. Cowles, a defense witness, testifies (Tr. p. 453) that they had "no dealings with the royalty owner at all", that the companies "have kept that schedule in that way," and that the schedule was used by all of the major companies. Mr. Cowles further admits (Tr. p. 454) that "the market is restricted out there, if it (the schedule) is used constantly," and he says further that it is used constantly by a majority. It is the rule that Defendant was bound by this testimony.

Many cases have been variously decided on this and kindred matters by the Fifth Circuit. Some favor the seller of the gas and some favor the buyer. Lengthy briefs have been written and counsel for the major companies have been fairly successful in leading both counsel for the royalty owners and the Courts into a maize of complicated

and meaningless technicalities. It is to the great advantage of counsel for the major processors to do this, because it has resulted in such a confusion in the law as written in these various decisions that no lawyer can, from those decisions, so much as guess what may be his royalty owner client's rights under an ordinary unambiguous mineral lease!

To decide this question right, we think the facts should be stripped down to the naked bone to be inspected by the Court. We have tried to do that in this argument.

In view of the vast property and universal interest (Tr. p. 253) dependent on the decision in this case we respectfully represent that this Court should grant this writ and by its opinion and decision bring to an end the confusion existing in the law of the Fifth Circuit as to the method of determining market value of raw natural gas. The question is one of paramount importance and public interest throughout the southwestern gas producing areas where gas royalties are owned by a great percentage of the masses of the people. The savings of the people thus invested can never be stable nor even safe until some sort of order can be established in the law, nor until this price-fixing combination of major processors is broken up.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of Certiorari, and thereafter reviewing and reversing the decision of the Circuit Court and affirming the District Court.

RILEY STRICKLAND,
Amarillo, Tex.,
JAMES O. CADE,
Lubbock, Tex.,
Counsel for Petitioners.